

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 06-0233P

**Withholding Tax
For the Calendar Year 2005**

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ISSUE

I. Tax Administration – Penalty

Authority: IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on the lack of payment concerning the filing of the WH-3s for the 2005 calendar year.

The taxpayer's accountant compiled the WH-3 return. The information necessary to complete the WH-3 return was received one day before the due date. Due to the rush in completing the return, the accountant forgot to tell the taxpayer to include a check with the WH-3 return. Therefore, the taxpayer did not pay the tax due on the WH-3 return, and the taxpayer was assessed a negligence penalty for failure to pay.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as (1) the taxpayer has a complex accounting system, (2) The taxpayer relied on the taxpayer's accountant, (3) the taxpayer has an exemplary compliance record , and (4) the taxpayer did not commit willful negligence.

With regard to the complex accounting system and receiving the information one day prior to the due date, the Department feels the taxpayer could have filed an estimate at the due date and later filed a refund.

With regard to the taxpayer relying on the accountant, the Department looks at the taxpayer – accountant relationship as a principal – agent relationship. And that is, any action performed by the agent (accountant) on behalf of the principal (taxpayer) is binding on the principal

(taxpayer), and this includes errors. In the instant case, the accountant forgot to tell the taxpayer to include payment with the WH-3 return. This error committed by the accountant is binding on the taxpayer.

With regard to the compliance record, the taxpayer had a calculation error in the year 2002. The Department feels this calculation error removes the compliance record from consideration for the abatement of penalty.

The taxpayer also argues that penalty can only be applied in the case of willful negligence. The Department disagrees. Indiana regulation 45 IAC 15-11-2(c) specifically states that penalty be applied in the event the taxpayer was negligent. Regulation 45 IAC 15-11-2 (c) follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of the tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. . .

In the instant case, the Department feels the taxpayer was inattentive, regulation 45 IAC 15-11-2 (b) states inattention is negligence (and therefore subject to penalty). Regulation 45 IAC follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

As the taxpayer was inattentive, the Department finds the taxpayer negligent and subject to penalty.

FINDING

The taxpayer's penalty protest is denied.